

WHITE PAPER ON DISINCENTIVES

Prepared by Chip Holcomb, Senior Counsel, Attorney General of Washington

The purpose of this memo is twofold: first, to generally describe the current law as it provides for commercial access to governmental records and, second, to suggest mechanisms which would provide controls regarding such uses. This should not be seen as exhaustive nor as the position of my office, rather it is my personal judgment intended to generate discussion and, hopefully, resolution. Finally, it adopts the premise that the current law is inadequate. Of course, there may those who believe that "It ain't broke, so why fix it?"

I. EXISTING LAW

The public records laws are not administered by any agency. Generally, amendments to the law are suggested by agencies, the media and business interests that have recognized problems unique to certain governmental records. There has been little overall policy development, with the result that the law resembles a patchwork quilt. This is true with commercial access to government records.

The law only contains one provision generally applicable to commercial access to any public record. The original language is essentially unchanged and is found at RCW 42.17.260(9):

"This chapter shall not be construed as giving authority to any agency,... to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, ... shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor"

There are no reported judicial decisions regarding its meaning. Its interpretation has been the subject of several Attorney General opinions, however. While those opinions are not absolutely consistent, they can be summarized:

1. the statute only applies to lists generated by the agency, not the "raw data" containing the original information,
2. of natural persons, not business entities,
3. when the information is requested by a profit-expecting entity,
4. for the purpose of contacting the people on the list in order to further that profit-expecting activity.

For example, title insurance companies routinely access property information from county assessors (sometimes online) that contain real property information, such as ownership, sales, etc. AGO 1980 No. 1 That is permitted because they do not contact the people on the list. An association of antique car owners can contact those owning older vehicles because it was not a profit expecting activity. AGO 1975 No. 15 The statute does not contain any penalties for the inappropriate use of the records.

Some categories of public records have been accessible by only some requesters. For instance, driving abstracts are available to some commercial entities. The abstract includes accidents in which the person was driving, any reported convictions, forfeitures of bail and the status of the person's driving privilege in this state. Under RCW 46.52.130, the abstract

"...shall be furnished only to the individual named in the abstract, ~~employer~~ the insurance carrier that has insurance in effect covering the employer or a prospective employer, the insurance carrier that has insurance in effect covering the named individual, the insurance carrier to which the named individual has applied, an alcohol/drug assessment or treatment agency approved by the department of social and health services, to which the named individual has applied or been assigned for evaluation or treatment, ~~city and county prosecuting attorneys~~ ..." (Emphasis supplied)

The abstract is to only be used for related business purposes and a violation is a gross misdemeanor. It should be noted that the information in the abstract is generally a matter of record in courthouses in each county. The records are generally accessible by anyone. The legislature has treated the cumulative, electronic database of the records differently, apparently out of a concern that this information could be misused when collected in a single place.

Criminal history information (Chap. 10.97 RCW) reflects an individual's contacts with the criminal justice system, convictions, arrests, etc. That is also generally available to the public in the county where the contact occurred. Anyone can obtain records of conviction about anyone from the database that collects that information and is maintained by the State Patrol. See, RCW 10.97.050(1). Curiously, the legislature has provided that prospective employers whose employees will be in contact with children or vulnerable adults may only obtain those conviction records relating to physical or sexual abuse. See, RCW 43.43.830.

Similarly, accident records maintained by the State Patrol are available to "interested parties," meaning the representatives of the parties to the accident, including insurance companies. RCW 46.52.080 These records are otherwise declared to be "confidential" and may not be introduced as evidence in court. Failure to file the report is a gross misdemeanor and can result in a suspension of a driver's license. RCW 46.52.020, .030 However, there is no penalty for the inappropriate use of the records by any of the "interested parties."

II. POSSIBLE DISINCENTIVES

It is not unusual to find criminal penalties attached to statutory violations; however, given the workloads in every prosecutor's office, it is unlikely that anyone has ever been charged, much less convicted for the wrongful use of a public record. It is more likely that a financial penalty that can be enforced by agencies or aggrieved citizens would discourage violations. Since the perceived threat is the collection of information on individuals, the penalty could be assessed at a fixed amount for each name in the database together with the recovery of court costs including attorney's fees.

Of course, penalties only have meaning if there is a significant chance of detection. Given the widespread availability of information about individuals, there should be a mechanism that permits detection of the misuse of governmental records. The Federal Election Commission (FEC) is authorized to allow the "salting" of the lists of contributors by political committees to prevent solicitation of them by other political committees. The lists can contain pseudonyms with addresses which allows detection of solicitations by unauthorized committees. Perhaps agencies should be permitted to "salt" their lists to detect unauthorized use.

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